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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

BERNELL F. BUTLER,

Defendant and Appellant.

B259148

(Los Angeles County  
Super. Ct. No. MA059518)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie C. LaForteza and Frank M. Tavelman, Judges. Affirmed.

Gail Ganaja, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Timothy M. Weiner and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Bernell Butler of one count of felony abuse of an elder or dependent adult (Pen. Code, § 368, subd. (b)(1)).<sup>1</sup> He contends that the court erred in failing to instruct the jury on the lesser included offense of misdemeanor abuse of an elder or dependent adult (§ 368, subd. (c)). We disagree and affirm.

### **PROCEDURAL HISTORY**

An eight-count information charged defendant with assault with a semiautomatic firearm (§ 245, subd. (b), counts 1 & 7), making criminal threats (§ 422, subd. (a), counts 2 & 6), abuse of a dependent adult (§ 368, subd. (b)(1), count 3), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a), count 4), assault with a deadly weapon (§ 245, subd. (a)(1), count 5), and possession of a firearm by a felon (§ 29800, subd. (a)(1), count 8). The information further alleged that defendant personally used a firearm in connection with count 2 (§ 12022.5, subd. (a)), and personally used a knife in connection with count 6 (§ 12022, subd. (b)(2)).

Defendant pleaded not guilty to all of the charges and denied the weapons allegations. He proceeded to jury trial. At the conclusion of the prosecution's case, defendant moved for acquittal pursuant to section 1118.1. The court granted the motion as to counts 5 and 6 but denied it as to all remaining counts.

The jury found defendant guilty of abuse of a dependent adult (count 3), and found him not guilty of one count of assault with a semiautomatic firearm (count 7). The trial court declared a mistrial on the remaining charges (counts 1, 2, 4, and 8) because the jury was hopelessly deadlocked and unable to reach a verdict.

The trial court denied defendant's motion for new trial as to count 3. Thereafter, the trial court sentenced defendant to the upper term of four years on count 3 but stayed execution of the sentence pending resolution of counts 1, 2, 4, and 8. Defendant subsequently pleaded no contest to making criminal threats (count 2), after which the remaining charges were dismissed. The trial court lifted the stay of execution previously

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

placed on the four-year sentence for count 3, and imposed a concurrent three-year term for count 2. Defendant timely appealed.

## **RELEVANT FACTUAL BACKGROUND**

### ***I. Prosecution Evidence***

Defendant lived in a house in Lancaster with his longtime girlfriend, Angelita Talamontez, and two adult brothers, Chris and Robert Hirt.<sup>2</sup> Defendant was the legal guardian of Chris and Robert, both of whom are developmentally disabled and have the mental capacity of children.

On May 5, 2013, Talamontez left the house after having an argument with defendant. After she left, defendant instructed Chris not to let anyone into the house. Talamontez returned to the house later that day. She saw Chris locking the gates of the fence surrounding the property. Talamontez jumped over the locked fence and entered the house.

Talamontez heard defendant ask Chris why he (Chris) allowed Talamontez to enter the property. She heard defendant yell and scream at Chris. Talamontez went to the site of the commotion, the living room. She thought she heard defendant beating Chris, but did not see Chris and could not see what defendant was doing with his feet because the couch blocked her view. Talamontez became scared and went to a neighbor's house.

The neighbor, Daniel O'Brien, testified that Talamontez was crying, upset, and asking for help. He testified that Talamontez told him that defendant "got upset and fought one of the boys that let her in and beat up on one of the boys." O'Brien talked with Talamontez, and he told her that she needed to call 911 because he "wasn't going to get involved with that." Approximately 30 minutes after she knocked on his door, O'Brien drove Talamontez to the nearby Saddleback Market and called 911 from there. Talamontez told the 911 operator, "Um my boyfriend is drunk um he hit like socked

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<sup>2</sup> We refer to Chris and Robert by their first names to avoid confusion. We also note that various witnesses referred to Chris and Robert collectively as "the boys." We intend no disrespect by using these terms.

kicked our disabled um children that we take care of that are handicapped.” She later clarified that the “children” were not in fact children but were grown men whose minds were like those of children. Talamontez also told the operator that defendant had a gun.

Deputies from the Los Angeles County Sheriff’s Department, Jeffrey Rhea and Andrew Taylor, responded to the Saddleback Market about 45 minutes later. According to Deputy Taylor, Talamontez told him that defendant was very angry and drunk and had threatened her with a gun. She also told Deputy Taylor that she heard defendant yell at Chris and “heard a loud thud, which she believed was the sound of Chris hitting the floor.” Accordingly to Deputy Taylor, Talamontez further stated that she saw defendant kicking Chris while he was lying on the floor.

After spending about 45 minutes at the market interviewing Talamontez, contacting their supervisor, and creating a tactical plan, the deputies went to defendant’s house. No one was home, and defendant’s car was not in the driveway. Deputies entered the house through an unlocked door and found a blood stain on the floor behind a couch near the front door. Deputy Taylor called defendant’s cell phone number, and defendant told him that he was in Fresno and had not been home all evening.

The deputies contacted defendant’s cell phone service provider, which traced defendant’s cell phone to a local EZ-8 Motel. The deputies went to the motel and tried to call defendant on both his cell phone and the motel room phone. Defendant did not answer, so a team of deputies went to his room and knocked on the door. Defendant eventually answered the door after the deputies announced their presence three or four times.

Chris and Robert were in the room with defendant, who was wearing only boxer briefs. Deputy Rhea testified that Chris had “three pretty substantial bruises on his left eye.” Deputy Rhea further testified that Chris “had a bruising to the eye, had a black eye and some bruising on the side of his face,” and had “redness along the side of his face as well.” Deputy Taylor testified that Chris “had large swelling around his left eye, and the area around his left eye was also very purple and bruised.” Chris also had “redness and

minor swelling along his right cheek” and some red marks on his lower torso. Deputy Taylor described the bruising and swelling on Chris’s face as “extensive,” and Deputy Rhea noted that the injuries were “somewhat fresh.”

The deputies contacted Talamontez and asked her to come pick up Chris and Robert at the EZ-8 Motel. The deputies told Talamontez about the injuries to Chris’s face and recommended that Talamontez take him for medical treatment. Deputy Taylor testified that they did not call an ambulance to take Chris to the hospital because he was alert and oriented and had not “suffered any issues, any major issues” during the few hours that had elapsed since the time of the incident.

O’Brien drove Talamontez to the EZ-8 Motel to pick up Chris and Robert. O’Brien described Chris’s face as “beaten up” and testified that “[h]e got punched quite a few times, it looked like.” O’Brien also testified that he saw a “big knot” on Chris’s forehead.” According to O’Brien, he started driving Talamontez and Chris and Robert home but then took them to the hospital instead. According to Talamontez, she took Chris and Robert to the emergency room at some later point because O’Brien had to go to work and she needed to wait for another ride. Chris was discharged after being examined by hospital staff.

Talamontez never talked with Chris about his injuries or how he got them. Chris testified about them at trial, however. Chris testified that defendant “used his fist” and “probably just like punched” Chris in his face, causing the bruising and “swellness” after telling Chris that he “ain’t supposed to let nobody inside the house.” Chris further testified that he was standing up when defendant punched him, but fell to the ground after being hit. He hit the floor “somewhat” hard, hard enough that his nose started bleeding. According to Chris, “that was pretty much it.” Chris testified that he never hit defendant and did not hit anyone on the night of May 5, 2013.

Robert also was called to testify about Chris’s injuries, but he did not remember anything. The court permitted the prosecution to play for the jury a tape of an interview the investigating detective previously conducted with Robert. During that interview,

Robert told the detective that defendant gave Chris a black eye at the house by hitting him with his fist and also “was like throwing him around in the hotel.” Robert further stated that defendant got drunk at the hotel, “started acting dumb and stupid,” choked Chris, and threw Chris against the wall. The detectives showed Robert a photograph of Chris’s injuries, and he told them that all of the injuries on Chris’s face, both on the left and right sides, were from defendant. Robert admitted that he originally told the deputies that Chris’s injuries were caused by a fall. He explained he did so because he was embarrassed and because defendant told him to say that. He explained to the detective that he told the truth about defendant hitting Chris after the deputies asked him to tell the truth. Robert told the detective that he was scared that defendant would hit him too, or hit Chris with a bottle. Robert also stated that defendant had a pocket knife at the hotel and kept guns in the house. According to Robert, defendant had hit Chris before but never had hit Robert.

When a detective interviewed defendant on May 6, 2013, he told her that Chris injured himself by falling against the door as defendant rushed to get Chris and Robert out of the house before Talamontez could call the police with a fabricated story.

## ***II. Defense Evidence***

Defendant took the stand in his own defense. He testified that Chris and Robert were the sons of a friend of his sister, and that he assumed guardianship of them upon his sister’s death in 2007. Defendant testified that he treated Chris and Robert as though they were his own children. He disciplined them by taking away privileges and never struck or injured them.

According to defendant, he and Talamontez hosted a Cinco de Mayo party on May 4, 2013. Several people at the party were drinking, including Chris and defendant. Late in the evening, people started going home and defendant instructed Chris and Robert to do their chores. Defendant and Talamontez got into an argument when he discovered her smoking meth, and he asked her to leave the house. Defendant then heard Talamontez’s uncle, Ernesto Rivera, yelling from inside the house. Defendant tried to open the door,

but it felt like someone was pushing against the door to keep it closed. He then kicked in the door and found Chris, Robert, and Rivera on the ground. Defendant noticed that Chris's face was injured but did not know whether he hit Chris with the door or whether Chris was injured while tussling with Robert. Defendant picked Chris up, carried him into the bathroom, and cleaned up his injuries. While defendant was administering aid to Chris, Talamontez returned and threatened to call the police to falsely report that defendant injured Chris. Defendant then left the house with Chris and Robert and took them to a motel. When deputies called his cell phone, defendant told them that he had just returned from Fresno on Friday and allowed them to speak with Chris and Robert.

Defendant called Talamontez's uncle, Rivera, as a witness. Rivera testified that he lived at defendant's house from 2011 to 2013. According to Rivera, several people gathered at the house on May 4, 2013 after a Cinco de Mayo parade. Both Chris and Robert were drinking alcohol. Rivera went to his room at around 6:00 p.m. A few hours later, he heard Robert pushing Chris and ordering him around. Rivera told Chris and Robert to stop fooling around and finish their chores. A short time later, Rivera heard another disturbance. He saw Chris and Robert near the front door. He separated them, but then the front door swung open and defendant entered. Rivera left Chris and Robert with defendant and went back to his room. Rivera never saw defendant strike anyone or threaten anyone with a gun. Rivera did see Talamontez smoke methamphetamine a few times a week and sometimes smoked with her. Rivera testified that Talamontez often called the police to report fabricated stories about defendant.

Defendant also called his neighbor, Stephen Harris. Harris testified that he never saw defendant with a gun and never saw him hit Chris or Robert. Harris described defendant's relationship with Chris and Robert as "[v]ery family oriented." Harris attended defendant's Cinco de Mayo party. When he left sometime between 9:00 p.m. and midnight, Chris was not injured.

Defendant's final witness was Miguel Damas, a friend of defendant's attorney. Damas testified that he videotaped an interview that defense counsel conducted with

Chris. The video of that February 27, 2014 interview was played for the jury. During that interview, Chris told defense counsel that he did not remember anything about the May 5, 2013 incident.

## **DISCUSSION**

Defendant was charged with and convicted of felony abuse of an elder or dependent adult. (§ 368, subd. (b)(1).) That offense is committed when a person who knows or reasonably should know that a person is an elder or dependent adult “willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered,” “under circumstances or conditions likely to produce great bodily harm or death.” (§ 368, subd. (b)(1).)

Misdemeanor abuse of an elder or dependent adult (§ 368, subd. (c)) is a lesser included offense of felony abuse of an elder or dependent adult. (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1335 (*Racy*).) “As is relevant here, the difference between felony elder abuse and misdemeanor elder abuse is whether the abuse is perpetrated ‘under circumstances or conditions likely to produce great bodily harm or death.’ If it is, the crime is a potential felony. (§ 368, subd. (b)(1).) If it is not, the crime is a misdemeanor. (§ 368, subd. (c).)” (*Racy, supra*, 148 Cal.App.4th at pp. 1334-1335.)~

Defendant contends that the court had a sua sponte duty to instruct the jury on the lesser included offense of misdemeanor abuse of an elder or dependent adult. He argues that the jury “could have concluded from [the] victim’s testimony” that he “committed the abuse under circumstances other than those likely to produce great bodily harm or death[.]” (§ 368, subd. (c).) Thus, in his view, the court prejudicially erred by failing to instruct the jury on this lesser included offense.

“““It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the



evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citation.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given. [Citations.]' . . . . [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) "[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*Id.* at p. 162.) "'Substantial evidence' in this context is "'evidence from which a jury composed of reasonable [persons] could . . . conclude[]" that the lesser offense, but not the greater, was committed. [Citations.]" (*Ibid.*; see also *People v. Shockley* (2013) 58 Cal.4th 400, 403.) The erroneous failure to instruct the jury on a lesser included offense constitutes reversible error only if an examination of the entire record establishes a reasonable probability that the error affected the outcome. (*People v. Breverman, supra*, 19 Cal.4th at p. 165; see *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Defendant contends that Chris's testimony "militated against a finding that the abuse occurred under such circumstances or conditions likely to cause great bodily harm or death." According to defendant, "Chris testified that appellant punched him once in the face, and that, as a result, he fell to the ground. [Citation.] Chris described the impact of his fall as being somewhat hard, and that when he hit the floor, his nose began to bleed. [Citation.] When asked to describe what happened next, Chris said [t]hat was pretty much it[.] [Citation.]" Defendant also argues that there was no evidence that Chris sustained injuries that were more than minor or moderate, that the deputies merely "recommended" that Talamontez seek medical treatment for Chris, and that Chris "was

not so injured such that he could not accompany appellant and Robert to the motel.” We are not persuaded.

Whether the abuse of an elder or dependent adult occurs “under circumstances or conditions likely to produce great bodily harm or death” (§ 368, subd. (b)(1)) is a question of fact for the trier of fact. (*People v. Clark* (2011) 201 Cal.App.4th 235, 245.) The circumstances and conditions a reasonable jury could consider “include, but are not limited to: (1) the characteristics of the victim and the defendant, (2) the characteristics of the location where the abuse took place, (3) the potential response or resistance by the victim to the abuse, (4) any injuries actually inflicted, (5) any pain sustained by the victim, and (6) the nature of and amount of force used by the defendant.” (*Ibid.*, footnote omitted.) Here, while the jury could reasonably infer that defendant punched Chris only once—contrary to defendant’s contention, Chris never stated the number of times that defendant punched him—the remaining evidence does not reasonably support the conclusion that defendant did so “under circumstances or conditions *other than those* likely to cause great bodily harm or death.” (§ 368, subd. (c) (emphasis added).)

Defendant, a father figure to Chris, an adult with the mental capacity of a child, hit Chris in the face with a closed fist. Even if defendant punched Chris only once, he did so in the face near the eye and did so with enough force to knock a grown man to the ground and cause bruising and swelling that persisted hours later. Chris hit the ground with such force that his nose started to bleed. There was no evidence that Chris (or Robert) ever struck or used physical force against defendant, or that either brother was particularly strong or large. (See *People v. Sargent* (1999) 19 Cal.4th 1206, 1221 [noting that whether an alleged victim of child abuse was a “17-year-old varsity linebacker” was a relevant factor for the jury to consider]; *Racy, supra*, 148 Cal.App.4th at p. 1336 [noting that the victim was “a rather large man who was not likely to suffer great bodily injury or death during the incident despite his age and physical limitations”].) To the contrary, defendant testified that he was able to lift Chris and carry him to the bathroom.

Defendant also had sufficient control over Chris to transport him to a motel, where Robert testified that he choked Chris and threw him against the wall.

Even if Chris's injuries could be considered minor or moderate, a debatable proposition since "[a]brasions, lacerations, and bruising can constitute great bodily injury" (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1042; see also *People v. Cortes* (1999) 71 Cal.App.4th 62, 80), evidence of actual or serious injury is not required to sustain a conviction under section 368, subdivision (b)(1). The statute by its terms requires only that the circumstances or conditions be *likely* to produce great bodily harm or death, whereas the lesser included misdemeanor requires that the circumstances or conditions surrounding the incident be "other than those likely" to produce great bodily harm or death (§ 368, subd. (c).) No reasonable jury could conclude from Chris's testimony that the circumstances fell into the latter category and not the former. The trial court accordingly did not err by instructing the jury only on felony abuse of an elder or dependent adult.

#### **DISPOSITION**

The judgment of the trial court is affirmed.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.